LIBRARY
SUPREME COURT, U. S.

FILED
DEC 14 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 73-617

SUCCESSION OF MRS. IRENE SCOTT CHOTIN
(JOSEPH SCOTT CHOTIN, TESTAMENTARY
EXECUTOR)

Petitioner

versus

UNITED STATES OF AMERICA

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF CLAIMS

REPLY FOR PETITIONER

C. ELLIS HENICAN
Suite 4440
One Shell Square
New Orleans, La.
70139

COUNSEL FOR PETITIONER

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

NO. 73-617

SUCCESSION OF MRS. IRENE SCOTT CHOTIN
(JOSEPH SCOTT CHOTIN, TESTAMENTARY
EXECUTOR)

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF CLAIMS

REPLY FOR PETITIONER

TO THE HONORABLE WARREN BURGER, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent's memorandum in opposition to the petition for writ of certiorari correctly states the law as enunciated by this Court in United States v. Wells, 282 U.S. 102, 118 (1930): "The words 'in contemplation of death' mean that the thought of death is the impelling cause of the transfer." (Emphasis Supplied). (Mem.,p.4).

However, this court made it clear that:

> "The question necessarily is as to the state of mind of the donor." (283 U.S. 117, Emphasis Supplied).

The testimony of decedent's family (Transcript, pp. 40, 94, 157), her physician's statement (Joint Exhibit 2L, p. 6), and the testimony of the attorney who prepared the notarial act of donation (Pl. Ex. 23, p. 19), established that the decedent was not concerned about dying, nor was she, by disposing of her property, preparing for that eventuality.

Although decedent died in her 80th year (2 years and 1-2/3 months after the donations in question), "most likely" from "acute heart failure, due to long-standing arteriosclerotic and hypertensive heart disease" (Joint Exhibit 2L, p. 6), the decedent's medical record shows that she was never hospitalized for treatment of any heart disease. (Joint Exhibit 2).

Moreover, the heart palpitation referred to in the Trial Commissioner's Findings 16 and 17 (Pet. App. A 17, 18), was diagnosed as "paroxysmal tachycardia" (Joint Exhibit 2E-3). In Lawyers' Medical Cyclopedia, Revised Volume 5A, at page 238, this disorder is described as follows:

> In "atrial (or auricular) paroxysmal tachycardia," an area of one of the atria (other than the sinus node) sends out a very rapid series of impulses which overshadow those of the sinus node, and the heart contracts in response to both series of impulses. The heart rate will

> be very rapid - from 120 to 250. This disturbance is characteristically of sudden onset. Also, when it ceases of its own accord, it ceases abruptly. This type of arrhythmia is more common in young people and is not usually associated with serious heart disease; however, it may occur in hypothyroidism, heart disease, and other conditions.
>
> Most patients with arterial paroxysmal tachycardia are aware of the very rapid heartbeat. Also, they may feel weak, breathless and nervous . . .
>
> Digitalis, quinidine, pronestyl, sedatives, and other drugs are used in treatment of atrial paroxysmal tachycardia. Prevention of recurrence involves treating the underlying disease.

In Lawyers' Medical Cyclopedia, Revised Volume 5A, page 220, is found the following description of arteriosclerotic hypertension:

> The term "hypertension (high blood pressure) refers to an elevated pressure in the arterial system . . .
>
> Systolic hypertension is a frequent finding in older people. This form is thought to be the result of arteriosclerosis

> with its attendant decrease in the elastic character of the aorta and the medium-size arteries. This is a benign disorder, which usually requires no treatment, and is considered to be a consequence of the aging process.

The respondent's memorandum in opposition to the petition for writ of certiorari refers to two episodes of heart fibrillation during decedent's hospitalization in 1961. This condition is described in Lawyers' Medical Cyclopedia Revised Volume 5A, at page 239, where it is said that this disorder:

> . . . occurs very often with mitral stenosis, hyperthyroidism, and senile heart disease; but it may occur transiently and sporadically (paroxysmal atrial fibrillation) in people with no evidence of organic disease . . . Treatment of the condition is directed toward the underlying disorder and control of the rapid ventricular rate . . . quinidine sulfate or other drugs may be used in an attempt to convert the rhythm to a normal sinus rhythm.

There is no evidence that the decedent had been told that she had arteriosclerotic hypertension prior to December 21, 1962, the date of the gifts in question.

Decedent's activities during the

year 1962 gave no indication that she was concerned about her health. Surely, no one who considered herself seriously ill would have undertaken a six-week Mediterranean cruise, which included extensive and strenuous sightseeing, visits to Paris, its famous restaurants and nightclubs, shopping while in Italy, walking to a much greater extent than even her husband could do, and taking delight in all of the shipboard activities (Pl. Exhibit 21). Nor would her doctors have permitted her to undertake such extensive travel had they considered her heart condition at all serious. Her visits to the doctor and hospital were all the result of the gastric ulcer from which she suffered, the recurrence of the problems it caused, and the operation to correct the condition. When she was admitted to the hospital in 1965, where she died on February 10th, it was for acute gastroenteritis, not heart disease. There is no evidence in the entire record from which it might be reasonably concluded that decedent knew that she was seriously ill, if, indeed, she was at the time of the disputed donations.

Moreover, one of the physicians who saw the decedent considered the fibrillation as being related to the "dumping syndrome". (Joint Exhibit 2G, p. 2). This is a condition which may follow "subtotal gastrectomy". The symptoms are weakness, dizziness, nausea and vomiting. Lawyers' Medical Cyclopedia, Vol. 4, p. 188.

As stated in United States v. Wells, 283 U.S. 102, 113:

. . . The best evidence of the

> state of decedent's health at the time the transfers were made is the statement of his doctor.

The record in this case contains the following statement of Mrs. Chotin's physician:

> Mrs. Irene Scott Chotin was under my care from 1949 until her death on February 10, 1965. There was no autopsy, but the most likely cause of death was acute heart failure, due to longstanding arteriosclerotic and hypertensive heart disease.
>
> Death came abruptly in Oschsner Foundation Hospital where she was convalescing from a gastro-intestinal upset, and until the moment of death she was in possession of all of her faculties and was quite alert. Mrs. Chotin was unusually cheerful and active despite her years, and if the thought of death ever entered her mind, even to the very last, I never detected any inkling of it.
>
> There was no new development in December 1962 to cause Mrs. Chotin to have any serious anxiety about her health.
>
> In spite of her 78 (or 79) years, Mrs. Chotin was remarkably alert and active mentally and physically and she frequently spoke of her plans for various activities and travel in the future. I doubt

> that Mrs. Chotin ever fully realized the gravity of her illness, or that the likelihood of impending sudden death entered her mind. (Emphasis Supplied). Joint Exhibit 2L, p. 6).

Finally, it is submitted that the question is not so much the actual physical condition of the donor, but rather the donor's attitude toward her physical condition and her outlook and plans for life. It was error for the Trial Commissioner to substitute his attitude toward the decedent's illness for the decedent's own attitude toward her physical condition, which was primarily due to the aging process, and which, therefore, was not alarming to the decedent.

The presumption created by Internal Revenue Code §2035 was evaluated by Judge Downey in Meyer, et al. v. The United States, 60 Ct.Cls. 474, 483 (1925):

> . . . The question necessarily involves the determination of a mental state, and that, too, the mental state at a given time of one who, at the time the question is for determination, has passed from life. The difficulties are therefore apparent. In the absence of proof as to express declarations of the decedent - seldom, we may assume, available to the Government - the burden of affirmative proof could but rarely, if ever, be successfully

assumed; and wisely, therefore, and perhaps of necessity also, the law has relieved the Government, under the conditions stated, of the burden and created the presumption.

But what is the result? Can it go further than to shift the burden of proof, leaving the presumption to prevail in the Government's favor in the absence of a reasonable showing to the contrary? Taxing statutes, when of doubtful interpretation, are always to be construed in favor of the taxpayer, and the spirit of this rule must be completely ignored if, in determining a question of fact as between the Government and the taxpayer, rigorous rules as to the proof required to overcome the presumption of the law are to be applied. For if the Government was deemed entitled to a presumption in its favor because of the difficulties of proof, it is to be borne in mind that even though a conveyance was in fact not in any degree made in contemplation of death, the personal representatives might and frequently would be beset by many difficulties in proving that negative fact. Circumstances must largely be relied upon, and these should be fairly - indeed, we think liberally - construed in favor of the taxpayer.

Moreover, the Trial Commissioner erroneously concluded that "the preponderance of the evidence weighs heavily on the side of a gift in contemplation of death." There is not a scintilla of evidence that Mrs. Chotin, in making the gifts in question, was motivated by purposes associated with the distribution of property in anticipation of death. The evidence overwhelmingly shows that Mrs. Chotin was not in a testamentary frame of mind when the donations were made.

> The presumption created by the statute . . . cannot stand against ascertained and proven facts showing the contrary to be true. (United States v. Wells, 283 U.S. 102, 113).

Treasury Regulations §20.2035-1(c) define the phrase "in contemplation of death". Such a transfer is a disposition prompted by the thought of death, even if there are other reasons for the transfer. Thus, to be "in contemplation of death", the transfer must be made: (1) to avoid estate taxes; or (2) as a substitute for a testamentary disposition; or (3) made for any other death-associated motive.

In this case, the record clearly establishes that Mrs. Chotin (1) had no thought of avoiding estate taxes, (2) had never discussed giving away her property or making a will, and (3) had no death-associated motive for making the transfers in question. Therefore, the gifts cannot be said to have been in contemplation of death.

For the reasons set out above, as

well as those stated in the petition for writ of certiorari, petitioner prays that the petition for writ of certiorari be granted.

(ORIGINAL SIGNED)
C. ELLIS HENICAN

C. ELLIS HENICAN
Suite 4440
One Shell Square
New Orleans, Louisiana
70139

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I, C. ELLIS HENICAN, attorney for petitioner, in the application for writ of certiorari and a member of the Bar of the Supreme Court of the United States, do hereby certify that on this day I have served copies of the foregoing Reply for Petitioner on:

Hon. Robert H. Bork
Solicitor General
Department of Justice
Washington, D. C. 20530

and

Hon. Scott P. Crampton
Assistant Attorney General
Attention: Mr. Thomas Smidt, II
Department of Justice
Tax Division
Washington, D. C. 20530

by mailing copies thereof, Air Mail, postage prepaid, addressed to their respective offices, this 13 day of December, 1973.

All parties required to be served have been served.

(ORIGINAL SIGNED)
C. ELLIS HENICAN

C. ELLIS HENICAN